FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1985

JAPAN WHALING ASSOCIATION, ET AL., PETITIONERS,

v.

AMERICAN CETACEAN SOCIETY, ET AL., RESPONDENTS

MALCOLM BALDRIGE, ET AL., PETITIONERS,

v.

AMERICAN CETACEAN SOCIETY, ET AL., RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE HOUSE OF REPRESENTATIVES AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Does the political question doctrine preclude judicial enforcement of a statutory requirement imposed upon the Secretary of Commerce, an executive branch official, in an area which may affect on foreign relations?

2. Where a congressional enactment may have some impact on international relations, is it improper for a court to consider a statute's legislative history in determining Congressional intent?

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BRIEF OF THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE HOUSE OF REPRESENTATIVES AS AMICI CURIAE

The Speaker and Bipartisan Leadership Group of the House of Representatives respectfully submit this brief as *Amici Curiae* in support of the respondents' position that the decision of the Court below should be affirmed. In an

effort to strengthen the schedules and programs of the International Convention for the Regulation of Whaling ("ICRW"), the Congress deemed it appropriate to enact legislation that would enforce compliance with these otherwise unenforceable international agreements. The resultant statute provides for economic sanctions against any nation that fails to cooperate with the conservation measures adopted by the International Whaling Commission ("IWC"). At issue here is the failure of the Secretary of Commerce to impose the statutorily decreed sanction, a percentage reduction of the noncooperating nation's fishing allocation within the territorial waters of the United States.

The Courts below found that pursuant to the Pelly and Packwood-Magnuson Amendments, 22 U.S.C. § 1978 (1982); 16 U.S.C. § 1821(e)(2) (1982), the Secretary of Commerce was under a mandatory duty to certify Japan as having diminished the effectiveness of the ICRW and, once having certified, was then under an obligation to impose the fishing allocation reduction sanction provided for by law. The District Court's order was stayed pending appeal and after the Court of Appeals for the District of Columbia Circuit affirmed the lower court's decision, this Court granted certiorari.

The petitioners contend that the decision below erroneously interprets the relevant statutory language as depriving the Secretary of Commerce of discretionary authority with respect to such certifications. Petitioners further contend that it is improper for the judiciary to enforce, by the issuance of a writ of mandamus, compliance by executive branch officials with mandatory prescriptions of statutes affecting foreign relations.

INTEREST OF THE AMICI CURIAE

This is a case in which the court below identified "[t]he fundamental question" as "one of statutory interpretation." *American Cetacean Society* v. *Baldrige*, 768 F.2d 426, 432 (D.C. Cir. 1985). Resolution of the questions presented to the Court, however, may implicate Constitution-

al concerns, the importance of which extend far beyond the interpretation of this particular statute. The Speaker and Bipartisan Leadership Group of the United States House of Representatives ("House amici") do not address the proper reading of the statute. Rather than join in the debate on statutory interpretation, the House amici submit their views on two limited, but vitally important, aspects of the case. These two aspects pose, in the considered opinion of the House amici, a significant threat to the vitality of the separation of powers doctrine and to the future proper functioning of our government.[1]

The two aspects which demand the attention of the House amici are novel theories of separation of powers, initially voiced by the dissenting member of the panel of the Court of Appeals and now presented to this Court indirectly by the Executive and more openly by the Japanese petitioners. The first theory is that the judiciary should, as a matter of discretion, refuse to entertain legal actions which seek to mandate executive branch compli-

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[1] Participation by the Speaker and Bipartisan Leadership Group is the standard mechanism by which the House of Representatives pursues its institutional interests in litigation. *See, e.g., Synar* v. *United States*, No. 85-3945 (D.D.C. Feb. 7, 1986), *appeal pending sub nom. Bowsher* v. *Synar*, Nos. 85-1377, 85-1378, 85-1379 (U.S. oral arg. scheduled Apr. 23, 1986); *Ameron, Inc.* v. *U.S. Army Corps of Engineers*, 607 F. Supp. 962 and 610 F. Supp. 750 (D.N.J. 1985), *appeals argued*, Nos. 85-5226, 85-5377 (3d Cir. Oct. 29, 1985); *Lear Siegler, Inc.* v. *Lehman*, No. CV 85-1125-KN (C.D. Cal. Nov. 21, 1985); *In re Benny*, 44 Bankr. 581 (N.D. Cal. 1984), *appeal argued*, No. 84-2805 (9th Cir. July 10, 1985). In this filing, Speaker Thomas P. O'Neill, Jr., is joined by Majority Leader Jim Wright, Republican Leader Robert H. Michel, Majority Whip Thomas S. Foley, and Republican Whip Trent Lott.

In light of the institutional nature of this participation and the status of the House of Representatives in the government of the United States, it would appear appropriate for the Speaker and elected leadership of the House of Representatives to be permitted to avail themselves of the right to submit a brief as *amici curiae* without the consent of the parties, in accordance with the provisions of Sup. Ct. R. 36.4. In this instance, written consent has, nonetheless, been obtained and copies of the consent letters have been filed with the Clerk of the Court.

ance with statutory requirements in instances where foreign relations may be affected. The second theory is that in parsing the legislative intent of a statute affecting foreign relations, the judiciary should depart from traditional standards of statutory construction and employ an analysis which rejects the use of legislative history as evidence of intent.

These two points, which the Court may choose to address, are matters of utmost concern to the House of Representatives. Were the Executive empowered to ignore the mandates of legislative enactments requiring executive action, a serious realignment of the delicate balance of our Constitutional system would result. Congressional authority respecting foreign commerce is more than precatory. The full panoply of legislative authority in the regulation of foreign commerce provided in the Constitution should be preserved. The House amici are uniquely qualified to bring these concerns to the Court's attention and suggest an appropriate resolution. For these reasons, the House amici respectfully submit for the Court's consideration the following brief which, in compliance with Sup. Ct. R. 36.2, has been kept as concise as possible. The House amici, by urging affirmance of the decision of the Court of Appeals and District Court below, support the position of the respondents.

SUMMARY OF ARGUMENT

The Pelly Amendment of 1971 and the Packwood-Magnuson Amendment of 1978 were enacted to "provide enforcement leverage" for the ICRW. *American Cetacean Society*, 768 F.2d at 428. Congress, utilizing its clear authority to regulate foreign commerce, U.S. Const., art. I., § 8, cl. 3, and provide rules and regulations governing United States territory and property, U.S. Const., art. IV, § 3, cl. 2, has imposed a series of penalties on those nations failing to abide by the ICRW.[2] Although Congress

[2] Neither Petitioner has challenged the constitutionality of either the Pelly or Packwood-Magnuson Amendments. Nor could they have

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later viewed the choice as unwise, its first attempt, the Pelly Amendment, imbued the President with considerable discretion.

The report to the House on what was to become the Pelly Amendment succinctly set forth both the scope of the legislation and the discretion given the Executive by the statutory language:

> The scope of the legislation has been expanded [from Rep. Pelly's original proposal] to include all international fishery conservation programs as opposed to domestic United States programs dealing only with North American Atlantic Salmon. Authority to prohibit importation of fish products has been vested in the President upon certification by the Secretary of Commerce. *The President has full discretion in exercising this authority,* however, he must advise the Congress of his actions or explain his inaction if such be the case, within 60 days following certification by the Secretary of Commerce.

Enhance the Effectiveness of International Conservation Programs, H.R. Rep. No. 92-468, 92d Cong., 1st Sess. 3-4 (1971) (emphasis added). This legislation proved to be inadequate to accomplish the policy objectives of the Congress. Unsatisfied, the Congress revisited the issue several years later. Alarmed that the Executive's "implementation" of the Pelly Amendment sanctions had not provided the desired degree of enforcement leverage, Congress adopted a further amendment in 1979.

A chief proponent of the improved enforcement mechanism explained the need for improvement to the House:

> Mr. Speaker, to date, the Pelly amendment has been somewhat effective in encouraging compliance with fishery agreements. The major weakness has been that certification does not necessarily impose any penalty on the violator. In fact, in all five cer-

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done so credibly. Any claim that Congress had exceeded its Article I bounds by regulating either the importation of fish products or the granting of fishing allocations within our territorial waters would be quickly rejected by the courts.

> tifications to date, the President has not used his discretionary power to impose a penalty.
>
> In order to improve the effectiveness of the Pelly amendment, the legislation before us will provide for a specific penalty to result from certification.

125 Cong. Rec. 22083–84 (1979) (statement of Rep. Oberstar).

The instant dispute arises from respondents' contention, found meritorious by the courts below, that the Secretary of Commerce has failed to apply the "specific penalty" provided for by the Packwood-Magnuson Amendment. Resolution of this dispute is an appropriate matter for the judiciary. Whether the executive branch is required to abide by, and enforce, specific nondiscretionary statutory directives is a question appropriate for judicial determination. The standards of justiciability announced by this Court leave no doubt that a case or controversy is presented which requires adjudication.

The distribution of functions among the three great departments of our government requires that a legislative enactment falling within an era of responsibility devolved upon the Congress must be respected by Executive branch officials. Equally true is the proposition that a failure on the part of Executive branch officials to comply with the laws of the United States must be redressable before the judiciary. The mere fact that the Congressional scheme or regulation may have an impact on foreign nationals does not divest either the Congress or the Judiciary of their ordinary and appropriate roles. To permit the Executive to decide at will whether it desires to enforce a particular statute would reduce the Constitution's grant to the Congress of lawmaking authority to a mere advisory function.

It is also inconsistent with the legislative role of Congress, and the judicial role of the Courts, to depart from normal and traditional standards of statutory interpretation when called upon to adjudicate a dispute involving foreign commerce legislation. The suggestion of the Court

of Appeals dissent, that such a separate standard is appropriate, should be rejected.

ARGUMENT

I. THE EXECUTIVE BRANCH IS BOUND BY THE DULY ENACTED LAWS OF THE UNITED STATES AND THE COURT HAS BOTH THE RIGHT AND THE DUTY TO INTERPRET AND UPHOLD THOSE LAWS

Of principal concern to the House parties is the suggestion in the Solicitor General's brief that:

> even if the Secretary did have a nondiscretionary duty to certify Japan, mandamus would be inappropriate . . . .
>
> . . . [because] the institutional and equitable considerations surrounding Executive Branch judgment in foreign affairs offer strong counsel against the use of mandamus . . . .
>
> . . . [and] "matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of governments as to be largely immune from judicial inquiry or interference.'"

Brief for the Federal Petitioner (Executive Branch) at 45–48 (quoting *Regan* v. *Wald*, No. 83-436, slip op. at 19). Even more disturbing are the assertions of the Japanese intervenors who, quoting leading precedents out of context, assert that:

> "[t]he President alone has the power to speak or listen as a representative of the nation," . . . and . . . "the President is exclusively responsible" for the "conduct of diplomatic and foreign affairs". . . .

Brief for Petitioner Japan Whaling Association, *et al.*, at 43 (citations omitted). The Japanese Petitioners then go on to declare that this case is unsuitable for judicial action because affirmance of the Court of Appeals decisions would "embarrass" the Executive Branch.

Taking a cue from Judge Oberdorfer's dissent, the Executive and the Japanese trade associations suggest that duly enacted laws of the land are unenforceable when-

ever they happen to touch on foreign affairs. They suggest that the role of Congress in the foreign affairs area is minimal and that of the courts nonexistent. The Petitioners intimate in a nebulous and nonspecific way that while the courts may have jurisdiction over the case, they can or should refrain from exercising it. The Executive argues that relief was "inappropriate," "equitable considerations" apply, "deference" should be given, this is a "delicate matter" which "could have repercussions," and so the Court "should hesitate" rather than "inject" itself. Brief for the United States at 46–50. The common thread in the Executive's various formulations is that they counsel against a ruling, without stating that the courts lack jurisdiction or power in the matter. None of these statements constitutes a flat assertion that the case presents a political question, beyond judicial cognizance. On the contrary, the Executive expressly declines to raise "constitutional issues of justiciability," Executive Brief at 47 n. 56.

Having declined to dispute the court's jurisdiction and power to resolve the case, the Executive must then face the fundamental rule that justiciability is a matter of power, not of convenience. Once the requirements of Article III are met, the obligation of the Judiciary is to decide cases presented to it. As Chief Justice Marshall pronounced:

> It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution . . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

Cohens v. *Virginia,* 19 U.S. (6 Wheat.) 264, 404 (1821).

An examination of the factors relevant to the political question doctrine demonstrates the reason the courts carry out their duty to rule in properly presented cases. Justice Powell summed up these considerations as they

apply in the context of foreign affairs, in *Goldwater* v. *Carter,* 444 U.S. 996, 998–99 (1979) (concurring opinion) (citing *Baker* v. *Carr,* 369 U.S. 186, 217 (1962)). He first inquired whether there was "a textually demonstrable constitutional commitment of the issue to a coordinate political department." 444 U.S. at 998 (quotation omitted). No such commitment exists, even in a foreign affairs matter, where "the text of the Constitution does not unquestionably commit the power . . . to the President alone." *Id.* at 999. In this case, the Article I power of the Congress to regulate foreign commerce could not be more apparent, and the absence of an exclusive textual commitment to the President is also crystal clear.

Second, Justice Powell asked whether there was a "lack of judicially discoverable and manageable standards for resolving this case." *Id.* at 999 (quotation omitted). No such lack exists when "[r]esolution of the question . . . . requires [the Court] to apply normal principles of interpretation." *Id.* Justice Powell also reemphasized the rule that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* In this case, the Court faces questions requiring no more than application of normal principles of interpretation. The statutes and legislative history ask for no weighing of unknowns or imponderables; they require construing a law concerning commerce, the standard fare of the Judiciary.

1. *Under the Constitution, Congress Makes Policy In the Foreign Commerce Area*

Under Article I, Congress is empowered to make laws respecting commerce—both domestic and *foreign.*[3] The Executive's role is to implement the laws duly enacted by

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[3] U.S. Const., art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes").

Congress.[4] The judiciary's role is, and has always been, to construe statutory and constitutional language and declare what the law is. Nothing in the text of the Constitution or of any precedent renders Congressional enactments touching on foreign affairs any less legitimate than other enactments. This Court has on several occasions observed the breadth of the plenary authority of the Congress to regulate foreign commerce. Recently, this Court reiterated the observation that "[a]lthough the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several states' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be greater." *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 448 (1979). In *Japan Line,* Justice Blackmun noted this Court's long-standing determination that Congress was given " 'exclusive and absolute' power over foreign commerce." *Id.* n.13 (citing *Buttfield* v. *Stranahan,* 192 U.S. 470, 492–93 (1904)).[5]

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[4] As has been repeatedly noted, the Constitution's mandate that the President "take Care That the Laws be faithfully executed," U.S. Const., art. II, § 3, is a limitation upon, rather than, as the Executive sometimes claims. an extension of, Executive power. The faithful execution clause derives from the English Bill of Rights of 1688, which declared "illegall," the "pretended power of suspending of laws, or the execution of laws by regall authority, without consent of Parlyament." 1 W. & M., sess. 2, ch. 2 (1688).

The purpose of that portion of the Bill of Rights was to specifically deny the King the power to modify, subvert, or undo at will the laws duly enacted by Parliament. Similarly, the purpose of our faithful execution clause was to make manifest that the Executive is obligated to implement, rather than suspend or undermine, the laws duly enacted by Congress. *See, e.g., Kendall* v. *United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524, 613 (1838); *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952) (Jackson, J., concurring); *id.* at 610 (Frankfurter, J., concurring).

[5] Congress' power to regulate foreign commerce is mentioned first in the clause, and is at least as great as the power to regulate interstate commerce. *See, e.g., Pittsburgh & Southern Coal Co.* v. *Bates,* 156 U.S. 577, 587 (1985) (Field, J.) (interstate commerce power is "as absolute as

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2. *This Case is Justiciable under Baker v. Carr and Its Progeny*

In *Baker* v. *Carr,* this Court held that " 'whether a question falls within [the political question] category' " is determined largely by " 'the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination.' " *Baker* v. *Carr,* 369 U.S. 186, 210 (1962) (quoting *Coleman* v. *Miller,* 307 U.S. 433, 454–55 (1939)). The court, however, was careful to note that not every matter touching on politics is a political question. *Id.* at 209. The Court observed that although there have been "sweeping statements to the effect that all questions touching foreign relations are political questions," it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211. The court then proceeded to give a number of examples of questions that were political and questions that were not. Examples of political questions were "whether a treaty has been terminated," the "recognition of foreign governments," the determination of "a person's status as a representative of a foreign government," and the determination of "which

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the power to regulate commerce with foreign nations"); *License Cases,* 46 U.S. (5 How.) 504, 578 (1847) (Taney, C.J.) (interstate and foreign commerce powers are "coextensive").

In fact, some courts have indicated that the foreign commerce power is substantially broader than the domestic Indian and interstate commerce powers. *See, e.g., Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 448–51 (1979); *Brolan* v. *United States,* 236 U.S. 216, 222 (1915); *Lottery Case,* 188 U.S. 321, 373–74 (1903) (dissent). For a general discussion, *see* Congressional Research Service, *The Constitution of the United States: Analysis and Interpretation,* 149–50 (1973).

Congress' regulation of foreign commerce has often taken the form of prohibitions; such prohibitions have been upheld by this Court. *See, e.g., Buttfield* v. *Stranahan,* 192 U.S. 470 (1904) (act banning importation of inferior quality tea upheld); *The Abbey Dodge,* 223 U.S. 166 (1912) (act banning the importation of sponges taken by diving in the Gulf of Mexico upheld); *Weber* v. *Freed,* 239 U.S. 325 (1915) (act banning the importation of prize fight films upheld).

nation has sovereignty over disputed territory." *Id.* at 212-13. By contrast, the court may, without hindrance from the political question doctrine, "construe a treaty," intepret "executive proclamations" of belligerency abroad for the purpose of determining whether other statutory provisions have been triggered and, once the sovereignty of a particular territory is established, determine "whether a statute applies to that area." *Id.* at 212. Thus the Court concluded:

> The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority.

Id. at 217.

In short, the issue is not whether the controversy has, as the present controversy certainly does, some relation to or effect upon politics. If that were the standard, virtually all major legislation would become unreviewable and effectively unenforceable; major legislation is almost invariably intertwined in politics. Rather the misleadingly named political question doctrine requires that issues that turn not on statutory or constitutional language but merely upon value judgments, individual preferences, political strategy, or other subjective determinations be left to the partisan political process. As one court of appeals has put it "courts traditionally have refused to undertake decisions on questions that are ill-suited to judicial resolution." *United States ex rel. Joseph* v. *Cannon,* 642 F. 2d 1373, 1378-79 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 999 (1982). Judicial scrutiny is denied to "so-called political questions" because policymaking is not part of the court's constitutional role and because indeed, "courts are fundamentally under-equipped to formulate national policies or develop standards *for matters not legal in nature.*" *Id.* (emphasis added).

The question presented by the Secretary's refusal to perform what the Courts below found to be a nondiscretionary duty is by contrast, purely legal. No standardless

policy judgments are asked of this Court; those judgments have already been rendered by Congress.

This case, moreover, is no more "political" than many others that this Court has found justiciable. This Court, for example, entertained a challenge to the Executive's agreement with Iran as to that nation's assets frozen during the hostage crisis. *See Dames & Moore* v. *Regan*, 453 U.S. 654 (1981) (The Iranian Assets Case). The agreement with Iran was the focus of international attention and came at a time of extreme tension between Iran and the United States. Had the agreement been invalidated by the courts, the government would indeed have been placed in an extremely awkward situation. That consideration, however, did not prevent this Court from entertaining the suit. Rather in reaching its decision, the Court specifically pointed to the sweeping language in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936), and suggested that it was misleading. *See Dames & Moore*, 453 U.S. at 661. The court instead opined that Justice Jackson's concurrence in *Youngstown Sheet & Tube Co.* v. *Sawyer* "brings together as much combination of analysis and common sense as there is in this area." *Id.* The court agreed that:

> When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case, the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." When the President acts in the absence of congressional authorization he may enter "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." In such a case, the analysis becomes more complicated, and the validity of the President's action, at least so far as separation of powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including "con-

> gressional inertia, indifference or quiescence." Finally, *when the President acts in contravention of the will of Congress, "his power is at its lowest ebb," and the court can sustain his actions "only by disabling the Congress from acting upon the subject."*

Id. at 668-69 (citations omitted) (quoting Justice Jackson's concurrence in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 637-38 (1952) (emphasis added)). The Court, in sum, agreed that the President's power "must stem either from an act of Congress or from the Constitution itself," *Id.* at 668 (quoting *Youngstown* majority, 343 U.S. at 585).

In the present case, the Executive attempts to act in defiance of statute. Accordingly, the Executive's power is "at its lowest ebb" and the Court cannot sustain the Exective's action without "disabling Congress from acting upon the subject," the subject in this case being that of foreign commerce an area explicitly ceded to Congress by the Constitution.

3. *Speculative Possibilities of "Embarrassment" Do Not Negate the Justiciability of This Suit or Avoid the Remedy of Mandamus.*

The foreign intervenors, in the alternative, suggest that the possibility of "embarrassment" by a judicial determination precludes the issuance of mandamus. While there may be instances where consideration of governmental dignity counsel against the issuance of mandamus,[6] this is not such a case.

In the rare instances where comparable situations have arisen, the Courts have displayed a willingness to encounter whatever "embarrassment" may result. In *Swearington* v. *United States,* 565 F. Supp. 1019 (D. Colo. 1983), the Court was presented with a controversy over an income tax refund to which the plaintiffs claimed entitlement

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[6] The writ of mandamus is "governed by equitable considerations" and "granted only in the exercise of sound discretion." *Whitehouse* v. *Illinois Central R.R. Co.,* 349 U.S. 366, 373 (1955).

based on an Executive Agreement reached with Panama in connection with the Panama Canal Treaty. The Court found that the "executive agreements do not supersede prior inconsistent acts of Congress because, unlike treaties, they are not the 'supreme Law of the Land,' " *id.* at 1021, and therefore concluded that the internal revenue code overrode and invalidated the inconsistent executive agreement.

Similarly in *United States* v. *Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955), the Court declared "void" an executive agreement between the United States and Canada, which was found to contravene the provisions of a statute dealing with the same subject matter—the importation of seed potatoes. The Court reasoned that "[t]he power to regulate foreign commerce is vested in Congress, not in the executive" and "the executive may not exercise the power by entering into executive agreements." *Id.* at 658. Responding to the contention that the executive agreement was a valid exercise of inherent presidential power, the Court stated "that while the President has certain inherent powers under the Constitution such as the power pertaining to this position as Commander in Chief . . . the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office." *Id.* at 659. That power, the court found, "is expressly vested by the Constitution in the Congress." *Id.* Thus, the Court concluded, "whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce *in the absence of* action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress." *Id.* at 559–60 (emphasis added). In summary, the Court said "foreign commerce [is] subject to regulation, so far as this country is concerned, by Congress alone" and "[e]ven though the regulation prescribed by the executive agreement be more desirable than that prescribed by Congressional action, it is the latter which

must be accepted as the expression of national policy." *Id.*

II. THE RULES OF STATUTORY CONSTRUCTION SHOULD NOT BE CONTINGENT UPON WHETHER THE STATUTE INVOLVED IS CONSIDERED TO CONCERN "DOMESTIC" OR "FOREIGN" AFFAIRS

The task confronting the courts below was the application of a statutory scheme to a particular set of facts. To fulfill their obligations, the courts hearing this case determined the meaning of statutory provisions by the application of the accepted rules of statutory construction. The District Court parsed the meaning of the Pelly and Packwood-Magnuson Amendments by following the traditional standards set forth by this and other courts. *See American Cetacean Society* v. *Baldrige,* 604 F. Supp. 1398, 1404–05 (D.D.C. 1985). It relied on the pronouncements of this Court in *United States* v. *Apfelbaum,* 445 U.S. 115, 121 (1980), and *Touche Ross & Co.* v. *Redington,* 442 U.S. 560 (1979), for the elementary principle of statutory construction that "[w]hen looking at the meaning of a statute, or a phrase therein, the Court must first look to the plain words of the statute." 604 F. Supp. at 1404. The District Court heeded the rule, often stated by this Court, that "[o]nly when the words of the statute are ambiguous or unclear is it proper for a court to resort to legislative history to derive the intent of lawmakers." *Id.* at 1405. Here the District Court found that "[b]ecause the phrase which triggers certification is not clearly defined in either statute, the Court will look to the legislative history of both Pelly and Packwood-Magnuson to determine its meaning." *Id.*

Judge Oberdorfer's dissent suggests a double standard for the construction of statutes, with a different set of rules for any statute touching on foreign affairs. These separate rules would bar reliance on the "secondary evidence" of legislative history as an aid in determining the meaning of a statute.

There is no basis in precedent or reason for such a distinction. The Pelly and Packwood-Magnuson Amendments should be construed exactly as would any other statute—by reference to the apparent meaning of the words as further illuminated by the legislative history. In previous cases construing statutes touching on foreign affairs, this Court has looked to the intent of Congress.[7] It should do so here.

Further, the Court should recognize that any purported distinction between "foreign affairs" statutes and "domestic" ones would, in the long run, be wholly untenable. As this case itself illustrates, there is no clear demarcation between foreign and domestic affair's statutes. The realities of modern life are such that, particularly in the field of commerce, the most domestic of statutes may have an impact on foreign nations, while any legislation in the field of foreign affairs may affect domestic policies or domestic welfare. The demarcation is purely semantic and fundamentally illusory. This very statute may be regarded as domestic, and indeed at one point the Japanese Petitioners so described it. *See* Japanese Petitioners' Brief at i.

CONCLUSION

The Solicitor and the Japanese petitioners have proffered, if only indirectly, two dangerous and unwarranted theories. First, they have suggested that Congressional

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[7] *See, e.g., Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). In *Dames & Moore*, the Court found implicit Congressional approval. The court noted, *inter alia*, that in a prior comparable claims situation, Congress had rejected an Executive agreement with Czechoslovakia, by passing legislation requiring that it be renegotiated. *See Dames & Moore*, 453 U.S. at 688 n.13. The fact that such legislation was validly enacted is another example negating the Executive's claim of exclusively in the foreign affairs area. At the same time, the Congress' action was predicated on the understanding that Congressional action means something and that once Congress has acted, the Executive branch is bound by Congress' determination. Clearly, if the petitioners views on justiciability and "equitable" discretion were ever to gain adherence, such an understanding would no longer be possible.

enactments affecting foreign affairs are nonjusticiable. Second, they have suggested that even if such statutes are justiciable, they should be denied the benefit of the ordinary rules of statutory construction. The Court should recognize the pernicious nature of these theories and the far-reaching harm to our system of government which could ensue from their acceptance. The House amici urge the Court to uphold the powers and dignity of both the Legislature and the Judiciary by categorically rejecting these novel theories.

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